

Kaur (Migration) [2019] AATA 1575 (30 January 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Jasvir KAUR

CASE NUMBER: 1701854

DIBP REFERENCE(S): BCC2014/3131445

MEMBER: Carmel Morfuni

DATE: 30 January 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa

Statement made on 30 January 2019 at 5:02pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – applicant not spouse of sponsor – evidence of joint bank account provided – no evidence of shared household responsibilities – credibility issues – allegation relationship contrived for migration purposes – multiple marriages – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65, 359

Migration Regulations 1994 (Cth), rr 1.1, 1.23, cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 16 January 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The Tribunal explained at the commencement of the hearing, the provisions of Section 359AA of the Act (a copy of which is attached to this decision).

3. Background

4. In her visa application for the current visas 820 and 801 dated 20 November 2014 , the applicant revealed that she had been married and divorced twice before she married her current sponsor. In summary, it indicates that she married her first husband on 17 April 2008, arrived in Australia on a student visa with him on 2 August 2009. They divorced on 22 March 2012. She then married her second husband on 23 March 2012 and they divorced on 19 October 2014.
5. She married her current sponsor Mr David Armstrong on 19 November 2014 whom she claimed in written evidence to have met in 2011 at work and in her oral evidence, on 14 February 2012 at work. The inconsistency of these dates has no bearing on or relevance to the outcome of this case.
6. At the time of application, Class UK contained Subclass 820. The criteria for the grant of this visa are set out in Partner subclass 820 (UK - Temporary visa) and Partner subclass 801(BS - Permanent visa) of Schedule 2 to the Migration Regulations 1994 (the Regulations). The visas were refused by the Department delegate on 16 January 2017.
7. The applicant claims that she and her sponsor husband (the parties) separated permanently when he walked out on her on 30 November 2018.
8. It is the delegate's decision dated 16 January 2017 not to grant the visas which is currently under review.
9. The applicant advised in writing on 18 October 2018, following the delegate's decision to refuse the visa that her husband had left her on 30 January 2018 and that the relationship no longer existed but that she had suffered family violence perpetrated by him (Regulation 1.23). The parties have no children of the relationship and there is no evidence that the sponsor has died. Thus no other claim has been made under that Regulation.
10. The primary criteria for the visa must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.820.211 and 820.221 which require that at the time of application and decision respectively, the applicant needs to be the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist.

11. Those circumstances include that the applicant, or a member of the family unit, has suffered family violence committed by the sponsor: cl.820.211(8) or (9) and 820.221(3)(a) and (3)(b)(i). The applicant has claimed the family violence exception.
12. The definitions of spouse and de facto partner are given respectively in sections 5F and 5CB respectively.
13. The applicant did not request an interpreter at the hearing and was English proficient.
14. The delegate refused to grant the visa on 16 January 2017, 820.211 on the basis that the applicant did not meet cl.820.211(2)(a) at date of application or cl.801.221 at date of decision because she did not meet the definition of spouse or de facto partner under sections 5F or 5CB of the Migration Act.
15. The applicant applied for review of the decision on 4 September 2017.
16. The applicant appeared before the Tribunal on 29 January 2019 to give evidence and present arguments. She did not request an interpreter. There were no other witnesses.
17. On the evidence provided, the Tribunal accepts that David Armstrong is the sponsor in this matter. He did not appear at the hearing.
18. The applicant was represented in relation to the review by her registered migration agent. Mr. Suraj HANDA.
19. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The Tribunal has before it the evidence contained in the department and tribunal files including any written submissions, representations and the oral evidence at the hearing.
21. The prior existence of a spouse or de facto relationship is a precondition to a valid claim of family violence. The first issue therefore for the Tribunal to decide is whether or not such a relationship existed and if it finds that such a relationship did exist and no longer exists, it may consider a valid claim for family violence under the Act.
22. At the date of application the parties were married so the Tribunal needs to be satisfied that the applicant is the spouse of the sponsor under s5F of the Act. That section requires that the parties:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and

- (d) they:

23. (i) live together; or

24. (ii) do not live separately and apart on a permanent basis.

25. Regulation 1.1 5A(3) (attached to this decision) sets out the factors which the Minister must consider in making an assessment of whether or not the requirements of Section 5F are met (s5F(3)).

a. Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.

The parties provided evidence of having a joint ANZ bank account, as the delegate observed approximately 18 months after they claimed to have committed to a life to the exclusion of all of the others. The bank account contained money provided by your sponsor to the applicant, the sponsor being a director of a company and the money deposits apparently being salary to the applicant. There were large withdrawals and transfers to the applicant. In oral evidence the applicant stated that she had her own bank account into which Centrelink payments were made. The oral evidence indicated that a joint bank account was used by the sponsor who withdrew payments to pay a mortgage in relation to a property in which the applicant had no interest, and that the sponsor still continued to own joint property with his former partner. The written and oral evidence, did not persuade the Tribunal that the parties pooled their finances and the Tribunal attached little weight to it.

b. Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.

The evidence indicated that during the whole relationship that the parties had, they're often lived with other people, spent some time together and that the sponsor had a relationship with his long standing former partner prior to meeting the applicant. There was no evidence before the Tribunal that there were shared household responsibilities between the parties. In oral evidence, the applicant conceded that the sponsor had had a relationship with his girlfriend (the girlfriend) prior to meeting the applicant that that relationship continued throughout the parties' relationship, and that it continued after the sponsor left the applicant. She stated that she only realised this after he left her. The Tribunal was not persuaded that the applicant only knew about the girlfriend's involvement during the marriage until after he left the applicant. There were long absences whilst the sponsor travelled overseas with the girlfriend.

Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

The parties provided photographs of their wedding and with some friends, statutory declarations from friends supporting their relationship invitations, personal statements and a joint travel itinerary. The Tribunal considers them of limited

probative or evidentiary value and attaches little weight to them in light of the fact that the whole time that the parties were together the sponsor had a continued relationship with the girlfriend including the financial involvement shared by them and their frequent travel together. The Tribunal attaches some weight to the fact that the parties socialised with friends.

c. Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

The oral evidence from the applicant reveals a pattern of emotional withdrawal which the sponsor displayed towards her, his lack of communication, lack of caring and specifically during a four-day trip to Brisbane where he went out without her and his behaviour was such that she left after two days, the financial issues already canvased, lengthy periods of separate living arrangements and household arrangements, emotional lack of support and estrangement, criticism of the applicant's dress sense and attempted emotional control by the sponsor over time during the marriage culminating in separation in 2018. Most telling was the sponsor's continuous relationship with his previous girlfriend/partner during his marriage to the applicant which relationship continues. On the basis of this evidence, the Tribunal is not persuaded that at the date of application there was a mutual commitment to each other, that the parties drew emotional support from each other, companionship, and that they both saw the relationship as long-term, despite the fact that they had been married for several years

Other circumstances of the relationship.

The Tribunal asked the applicant pursuant to Section 359AA whether she had any comment as to the allegation on file received by the Department and referred to by the delegate that she and the sponsor were in a contrived relationship for migration purposes. She stated that she understood and had no comment. This matter had no bearing on the Tribunal's decision.

Credibility

26. The Tribunal put to the applicant several questions pursuant to section 359AA of the Act. It specifically put to her how many times she had been married to which she answered she had been married once, admitting, once the Tribunal put to her that she had stated in her application that she had been married three times, she agreed. When asked why she had not answered truthfully and revealed the first two marriages, she stated that they were arranged marriages so she did not consider them relevant and that she was ultimately fearful that if she had to go back to India she would be ostracised. The Tribunal did not find the marriage explanations as credible and gave them little weight.
27. When asked by the Tribunal, why the applicant had allowed her sponsor to sponsor her when he had a girlfriend before during and after the relationship she stated that she only found out about the girlfriend after the marriage failed. Given that she had previously conceded that she knew that the sponsor and the girlfriend had a continued financial relationship together and that she knew that they travelled

regularly together, the Tribunal did not accept her explanation as credible and gave them little weight.

Findings and Conclusions

28. The Tribunal is not satisfied, and finds on the basis of the whole of the evidence before it that at the date of application and of decision that the parties did not satisfy the requirements under s5F of the Act, at the date of application or decision as set out in paragraph 21 above and specifically (b), (c), and (d) as to a mutual commitment to a shared life together, a genuine and continuing relationship, or living together or not living separately and apart on a permanent basis.
29. As the applicant has not satisfied criteria necessary for the grant of the visa, the Tribunal is not required to further consider the applicant's claim of having suffered family violence perpetrated by the sponsor. It therefore read but did not assess the various statutory declaration and other statements in relation to supporting the family violence claims.
30. The Tribunal concludes that at the date of application and decision the applicant did not meet the requirements of regulation 820.211 or 820.221 and was not the spouse of the sponsor under section 5F. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Carmel Morfuni

Member

ATTACHMENT – EXTRACTS FROM THE MIGRATION REGULATIONS 1994

1.21 Interpretation

In this Division:

independent expert means a person who:

- (a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and
- (b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23(8) and (9).

relevant family violence means conduct, whether actual or threatened, towards:

- (a) the alleged victim; or
 - (b) a member of the family unit of the alleged victim; or
 - (c) a member of the family unit of the alleged perpetrator; or
 - (d) the property of the alleged victim; or
 - (e) the property of a member of the family unit of the alleged victim; or
 - (f) the property of a member of the family unit of the alleged perpetrator;
- that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

...

1.23 When is a person taken to have suffered or committed family violence?

- (1) For these Regulations, this regulation explains when:
 - (a) a person (the alleged victim) is taken to have suffered family violence; and
 - (b) another person (the alleged perpetrator) is taken to have committed family violence in relation to the alleged victim.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

- (2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim,

a court has granted an injunction under paragraph 114(1)(a), (b) or (c) of the Family Law Act 1975 against the alleged perpetrator.

- (3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

Circumstances in which family violence is suffered and committed — court order

- (4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and
 - (b) [...] order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.
- (5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — conviction

- (6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:
 - (a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or
 - (b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.
- (7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — non-judicially determined claim of family violence

- (8) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
 - (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.
- (9) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
 - (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim is:
 - (i) a spouse or de facto partner of the alleged perpetrator; or
 - (ii) a dependent child of:

- (A) the alleged perpetrator; or
 - (B) the spouse or de facto partner of the alleged perpetrator; or
 - (C) both the alleged perpetrator and his or her spouse or de facto partner;

or

 - (iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and
- (c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:
- (i) the alleged victim has suffered relevant family violence; and
 - (ii) the alleged perpetrator committed that relevant family violence.
- (10) If an application for a visa includes a non-judicially determined claim of family violence:
- (a) the Minister must consider whether the alleged victim has suffered relevant family violence; and
 - (b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and
 - (c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:
 - (i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and
 - (ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.
- (11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
- (a) an application for a visa includes a non-judicially determined claim of family violence; and
 - (b) the Minister is satisfied under paragraph (10)(b) that the alleged victim has suffered relevant family violence.
- (12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.
- (13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
- (a) an application for a visa includes a non-judicially determined claim of family violence; and
 - (b) the Minister is required by subparagraph (10)(c)(ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.
- (14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence must have occurred while the married relationship or de facto relationship existed

between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

MIGRATION ACT 1958

SECTION 5F

Spouse

(1) For the purposes of this Act, a person is the *spouse* of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a *married relationship* if:

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

- Note: Section 12 also affects the determination of whether the condition in paragraph (2)(a) of this section exists.